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IN THE

Supreme Court of the United States

No. 921, OCTOBER TERM, 1968
Now No. 31, OCTOBER TERM, 1969

PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Ohio

SUGGESTION OF MOOTNESS AND BRIEF OF APPELLEES JAMES A. RHODES, TED W. BROWN AND WILLIAM B. SAXBE

PAUL W. BROWN
Attorney General
CHARLES S. LOZEMAN
First Assistant Attorney General
JULIUS J. NEMETH
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
Attorneys for Appellees
JAMES A. RHODES, TED W. BROWN,
and WILLIAM B. SAXBE

MONARCH LAW PRINTERS AND PUBLISHERS, Columbus, Ohio, 44216

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SUGGESTION OF MOOTNESS

By letters dated May 8, 1969 and July 1, 1969, the Attorney General of Ohio requested extensions of time to July 10, 1969, and September 1, 1969, respectively, for the filing of the brief of appellees James A. Rhodes, Ted W. Brown, and William B. Saxbe in the above case. Those requests were based on the fact that legislation to amend certain election laws of Ohio was pending before the Ohio General Assembly. Included among the statutes proposed to be amended was Section 3513.257, Ohio Revised Code, which is reproduced, in the form in which it existed at the inception of this litigation, at pages three and four of the jurisdictional statement filed in the case.

The requirement there contained is that the nominating petition of an independent candidate for the

office of district representative to Congress be signed by not less than seven percent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district, has been the principal point in controversy in this case.

Amended Substitute Senate Bill No. 10 embodied the aforementioned proposed amendments in final form, including a change from seven to four percent in the number of signatures required on the nominating petition of an independent candidate for Congress pursuant to Section 3513.257, Ohio Revised Code. This bill has now been passed by the Legislature and signed by the Governor. The statutory changes are to become effective on October 30, 1969.

Since the statute at the root of the controversy has been substantially changed, it is respectfully suggested that the questions presented by this appeal are moot, and the appeal should be dismissed.

PRELIMINARY STATEMENT

On the matter of facts, Appellees Rhodes, Brown and Saxbe give substantial assent with the portions of Appellants' brief headed "Opinions of the Court Below", "Jurisdiction", "Constitutional and Statutory Provisions Involved", and Part I of the "Statement of the Case". We, therefore, and pursuant to Rule 40(3) of this Court, the Brief of Appellees does not contain corresponding sections. However, Appellees Rhodes, Brown and Saxbe feel that the "Questions Presented for Review" should be expressed.

QUESTION PRESENTED FOR REVIEW

To what extent may a state prohibit certain groups from nominating an independent candidate for Congress to have his name placed upon the ballot for a general election?

ARGUMENT

I

WILLIAMS V. RHODES, 89 S. CT. 5 (1968), DID NOT INVALIDATE SECTION 3513.257, OHIO REVISED CODE.

the well-established principle that a court rules only on those questions which are squarely before it, the constitutionality of Section 3513.257, *supra,* was not adjudicated in the *Williams* case, *supra,* and this statute remained in full force and effect. However, as previously stated, it has now been amended.

II.

WILLIAMS V. *RHODES,* 89 S. CT. 5 (1968), SET NO STANDARD BY WHICH THE VALIDITY OF SECTION 3513.257, OHIO REVISED CODE, COULD BE JUDGED.

The reluctance of the three-judge District Court panel to grant the full relief requested in *Williams* stemmed in large part from its feeling that it had "no guidelines for formulating specific, definite, wholly unprecedented remedies." In all probability, the same feeling was part of the motivation of the courts which passed upon the instant case, and this feeling was not materially altered by the decision of this Court in the *Williams* case, *supra.* This is especially relevant when viewed in light of the fact that this case originated as an action in mandamus, and that, traditionally, a writ of mandamus is not issued unless the petitioner shows a clear legal right thereto. In this regard, the observation of Mr. Chief Justice Warren, at 89 S. Ct. 30, is equally applicable to this case:

"• • • • • • • • •

"*Both the opinion of this Court and that of the District Court leave unresolved what restrictions, if any, a state can impose.* Although both opinions treat the Ohio statutes as a 'package', giving neither Ohio nor the courts any guidance, each contains intimation that a State can by reasonable regulation condition ballot position upon at least three considerations—a substantial showing of voter interest in the candidate seeking a place on the ballot, a requirement that this interest

> be evidenced sometime prior to the election, and a party structure demonstrating some degree of political organization. * * *'' (Emphasis added.)

The first two of the three bases listed above would certainly be applicable to an independent candidate as well, and to the Appellant in the instant case. However, the question of what constitutes a ''reasonable regulation'' was unanswered at the time the State courts passed upon the instant case, and remains so today.

Finally, even though the Supreme Court of Ohio, on October 23, 1968, chose to base its decision in this case on the ground that ''no substantial constitutional question exists herein'' (A. 31), it could have based its decision not to grant the equitable relief sought by Appellant herein equally well on the fact that the granting of such relief, namely the placing of Appellant's name on the ballot in the congressional district from which he sought to be a candidate, would have played a disruptive role in the 1968 election, the same basis upon which this Court denied full relief to the Socialist Labor Party, as indicated at 89 S. Ct. 12.

CONCLUSION

The statute at the root of this controversy has been so changed that the questions presented in this appeal are moot, and the case should be dismissed. However, if the Court determines that the appeal should not be dismissed, the validity of Section 3513.257, *supra,* should be judged on its own merits and, for the reason heretofore stated, the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

PAUL W. BROWN
Attorney General

CHARLES S. LOPEMAN
First Assistant Attorney General

JULIUS J. NEMETH
Assistant Attorney General
State House Annex
Columbus, Ohio 43215

Attorneys for Appellees
JAMES A. RHODES, TED W. BROWN,
and WILLIAM B. SAXBE